No. 84-1070

In the Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS, PETITIONER

v.

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Establishment Clause requires a State to deny financial assistance for the education of a blind person who is otherwise eligible for such assistance under the State's vocational rehabilitation program solely because the handicapped applicant intends to use that assistance to study for a church-oriented career.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE UNITED STATES

This case involves the Washington State Department of Services for the Blind's denial of vocational rehabilitation benefits to petitioner Larry Witters, a blind person who is otherwise eligible to receive such benefits from the State, solely because of his intention to use those benefits to pursue a college-level curriculum that would prepare him for a church-oriented career. The Department's decision was upheld by the Supreme Court of the State of Washington on the ground that to grant petitioner benefits under these circumstances would violate the Estab-

lishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. Noting that petitioner is not "pursuing a secular course of study with the personal objective of becoming a minister," but that the curriculum for his course of study "includes classes in Old and New Testament studies and church administration" (Pet. App. A10), the court held that "[i]t is not the role of the state to pay for the religious education of future ministers" (*ibid.*).

The interest of the United States in the matter arises because under several major federal programs of long standing, administered by the Veterans' Administration and the Department of Education, the federal government provides financial assistance to students pursuing higher education in preparation for church-oriented careers. The position of the United States, as expressed by Congress in the statute establishing one of these programs, is that the proper governmental criterion is whether the course of study will assist the beneficiary "in attaining *an educational, professional, or vocational objective* at any educational institution * * * selected by the [beneficiary], which will accept and retain the [beneficiary] as a student or trainee *in any field or branch of knowledge* which such institution finds the [beneficiary] qualified to undertake or pursue." 38 U.S.C. 1670 (emphasis added). It is not the role of the government, under these programs, to condition the availability of these benefits on the student's selection of a secular career.

The Veterans' Administration (VA) administers a widely-known educational assistance program, popularly called the "GI Bill," and similar programs under which the government provides directly to qualified veterans or dependents a sum of money to be used at their discretion for subsistence, tuition, and other costs of obtaining higher education. See 38 U.S.C. 1500-1521, 1601-1643, 1651-1693, and 1700-1766.[1] In each of these programs, the beneficiary is permitted to select his own school and course of study from among courses and institutions approved for VA purposes by state approving agencies. See 38 U.S.C. 1770-1780; 38 C.F.R. 21.4200-21.4280. The VA is prohibited by law from exercising any supervision or control over either the educational institutions or the state approving agencies involved. 38 U.S.C. 1782. The Veterans' Administration has long provided educational benefits to students pursuing a recognized educational objective that may lead to the ministry. See, *e.g.*, Department of Veterans Benefits Information Bulletin, IB 7-76, at 5 (1954); Program Guide § M-25, at 21-1 (July 2, 1980).

The Department of Education also administers major programs under which higher education students receive grants or loans to defray the costs of education at institutions of their choice, in preparation for careers of their choice. See 20 U.S.C. 1070a, 34 C.F.R. Pt. 690 (Pell Grant program); 20 U.S.C.

[1] In addition, the VA administers a program under 38 U.S.C. 1500-1521, which provides support to veterans with substantial service-related disabilities, including blindness, by financing training, employment, and medical and sociological services. Under this program, unlike those discussed in text, the VA may itself select and approve the training facility, and it pays the costs of tuition, fees, books, and other related items directly to the facility; subsistence payments are made directly to the veteran. As under the other programs, however, benefits under 38 U.S.C. 1500-1521 may be used for study in religiously-affiliated institutions and for courses of study leading to church-oriented careers.

1070b *et seq.*, 34 C.F.R. Pt. 676 (Supplemental Educational Opportunity Grant program); 20 U.S.C. 1070c *et seq.*, 34 C.F.R. Pt. 692 (State Student Incentive Grant program); 20 U.S.C. 1071 *et seq.*, 34 C.F.R. Pt. 682 (Guaranteed Student Loan program); 20 U.S.C. 1078-2, 34 C.F.R. Pt. 683 (Parent Loans for Undergraduate Students program); 20 U.S.C. 1087aa *et seq.*, 34 C.F.R. Pt. 674 (National Direct Student Loan program); 42 U.S.C. 2751 *et seq.*, 34 C.F.R. Pt. 675 (College Work-Study and Job Location and Development program). Under each of these programs, the student may attend essentially any institution of higher education accredited by a recognized national or state accrediting agency. See 34 C.F.R. 668.2(a)(5). There is no prohibition in these programs against a student using the federal financial assistance to attend a divinity school or a similar school to train to be a minister, and students have used federal assistance for these purposes. Indeed, among the recognized national accrediting agencies are the American Association of Bible Colleges, the Rabbinical and Talmudic Education Association of Advanced Rabbinical and Talmudic Schools, and the Association of Theological Schools in the United States and Canada. 49 Fed. Reg. 1275-1277 (1984).

The vocational rehabilitation program at issue here is itself a federally assisted program (Pet. App. C2). Although the record does not so reveal, the program would appear to be funded under the Rehabilitation Act of 1973, 29 U.S.C. 720 *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities" (29 U.S.C. 720(a)). Under this program, a designated

state agency prepares and implements a plan for the provision of services in accordance with the statutory purposes and federal program requirements. Respondent Washington State Department of Services for the Blind is a designated state agency eligible to receive funds under this program, and has chosen to use at least a portion of the funds to provide financial assistance to eligible persons for vocational training. Whether petitioner satisfies the federal eligibility requirements has not been addressed in this litigation, and we express no view on the matter. It is the view of the Department of Education, however, that—insofar as federal law is concerned—assistance to individual handicapped persons under this program may be used for any course of study that will promote the goal of preparing the person for gainful employment, without restriction to secular employment. See note 11, *infra*.

The decision of the court below, if not reversed, would therefore have a substantial impact on major federal programs, including the program under which this case apparently arose. The United States has a compelling interest in presenting its views in this case, toward the end of ensuring that GI Bill and other educational benefits continue to be provided to students on a neutral basis, without distinctions on the basis of religious content or the religious character of the student's choice of career.

STATEMENT

Petitioner Larry Witters, a college student, is blind. He is eligible for vocational assistance under Wash. Rev. Code Ann. § 74.16.181 (1982) (Pet. App. A2-A3, C2), revised and recodified in pertinent part as Wash. Rev. Code Ann. §§ 74.18.130, 74.18.140 (Supp. 1985), which established a vocational rehabili-

tation program administered by respondent, the State Department of Services for the Blind,[2] and funded by a combination of federal (80%) and state (20%) monies (Pet. App. C2). Petitioner was enrolled in a three-year Bible diploma course at the Inland Empire School of the Bible in Spokane, Washington—a private, nondenominational Christian college (Pet. 6)—when he first sought financial assistance from the Department (Pet. App. A3, C2-C3). He later changed to a four-year program that would also lead to a bachelor of arts degree from Whitworth College (*id.* at A3, C3), a private, accredited Presbyterian school (Pet. 6).[3] Petitioner's purpose in pursuing this course of study was to prepare himself for a position as a pastor, missionary, or church youth director (Pet. App. A1-A2, A9, C3). The curriculum for this course of study included classes in the Bible, church administration, ethics, and speech (*id.* at A10, C3-C4).

Respondent Department of Services for the Blind denied petitioner's application for financial assistance because of its view that " '[t]he Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in

[2] The Department of Services for the Blind was formerly called the Commission for the Blind, and is so denominated in the opinions below. See Pet. App. A1 n.1.

[3] We are informed by the Department of Education and the Veterans' Administration that Whitworth College is a participating institution under student aid programs administered by the Department and has been approved for GI Bill purposes as an institution of higher learning. Courses at the Inland Empire School of Bible have been approved for GI Bill purposes as non-college degree courses, but the School does not have a participation agreement with the Department of Education. (This does not mean that the School is ineligible; it may have chosen not to participate.)

theology or related areas' " (Pet. App. C4, quoting Department policy statement; see also *id.* at A2). Respondent's denial was upheld on administrative review (*id.* at E1-E8, F1-F7) as well as on judicial review in the state Superior Court (*id.* at C1-C9, D1-D37). Petitioner then appealed to the state Court of Appeals, which certified the case to the state Supreme Court. At each stage in the litigation, respondent based its position on the state constitution, and at no stage in the litigation did respondent contend that to grant the benefits to petitioner would violate the federal constitution.

The Supreme Court of the State of Washington, by a divided vote, affirmed respondent's decision to deny financial assistance to petitioner, but the court based its decision on the Establishment Clause of the First Amendment—not on the state constitution (Pet. App. A2). Applying the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the state Supreme Court concluded, first, that the state vocational assistance program had a secular purpose. The court held that the purpose stated in Wash. Rev. Code Ann. § 74.16.181 (1982)—"to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care"—demonstrates that "this statute has a valid secular legislative purpose" (Pet. App. A7). Turning to the second part of the *Lemon* test, however, the court concluded that "the principal or primary effect of the aid sought by [petitioner] would be to advance religion" (Pet. App. A10). It reached this conclusion by focusing "on the particular aid sought by the [petitioner]" rather than on the vocational rehabilitation program as a whole (*id.* at A8). Finally,

the court concluded that the record did not provide an "adequate factual basis" for determining whether the provision of aid to petitioner would entail "excessive entanglement," and that the " 'entanglement' inquiry is ill-suited to this case" (*id.* at A12).

In addition, the court below rejected petitioner's claim that the denial of assistance under these circumstances infringed his rights under the Free Exercise Clause of the First Amendment (Pet. App. A14-A16) and indicated that it was unnecessary to address his Fourteenth Amendment Equal Protection Clause claim (Pet. App. A16-A17).

SUMMARY OF ARGUMENT

The federal government has long provided financial assistance, in the form of scholarships, grants, loans, and work-study jobs, to students in higher education, and has permitted them to choose (from among a diverse and compendious list of institutions accredited on a neutral educational basis) their place of study and vocational objective. Some students (we know not how many) have used this assistance to obtain training for a religious career. The Supreme Court of the State of Washington, however, has held that the Establishment Clause requires the government to exclude such students from assistance programs otherwise available. According to the court, it is not the proper "role" of government to pay for the "religious education of future ministers" (Pet. App. A10).

We submit that this decision is erroneous. The constitutionality of a neutral program of assistance to a broad class of beneficiaries, selected without regard to religion, has never been questioned by this Court. Nor should it be. The consequence of the holding of

the Washington court would be to require the government to single out religious practice for disfavored status, to deny individuals equal treatment under government assistance programs for no reason other than their intended religious vocation. It would convert the First Amendment into an instrument of hostility to religion, rather than a protector of free religious exercise; an instrument of secular conformity, rather than a catalyst for greater diversity, pluralism, and individual choice.

The history of the adoption and early interpretation of the Establishment Clause shows that the original intention was not to deprive religion or religious individuals of benefits bestowed by the government. Rather, the framers intended the First Amendment to guarantee religious liberty by preventing the federal government from placing its imprimatur of approval on any particular religious sect or sects. The early practice in the area of government-supported education is particularly instructive: both Congress and the states frequently provided assistance to schools, whether they were public or private, religious or nonreligious.

Recent decisions of this Court have found many forms of direct assistance to religious *institutions*, including schools, troublesome because of the twin problems of avoiding an appearance of government endorsement of or involvement with the religious denomination involved and preventing intrusive methods of avoiding such appearances. No hard and fast rules have evolved in this difficult area. However, when government assistance has been provided not to the institutions, but to individual students and their parents, this Court has concluded that—so long as the assistance is provided neutrally to a broad spec-

trum of citizens—it is "not readily subject to challenge under the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983). The instant case falls into this latter category. The aid is provided not to religious institutions, but to a broad class of persons (the blind), selected on a neutral basis, without regard to religion. Under this Court's precedents, the Washington vocational rehabilitation program is constitutional.

The principal error of the Washington Supreme Court was in evaluating the "primary effect" of the rehabilitation program on the basis of this particular instance—the requested aid for petitioner Witters to study for the ministry—rather than looking to the program as a whole. Such an approach inevitably leads to a conclusion that the effect is predominantly religious; it makes a neutral program appear partial. Evaluated in its full context, the program neither advances nor inhibits religious practice. The Establishment Clause holding of the Washington Supreme Court should therefore be reversed.

Other questions raised in the petition are premature. The only issue addressed by the Washington Supreme Court was the federal Establishment Clause; state law issues remain to be decided. Although, as petitioner points out, adverse decisions on those state law issues could well give rise to further federal constitutional questions (and federal statutory questions as well), this Court should not reach out to decide those questions in the present posture of the case.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT PREVENT A STATE FROM PROVIDING VOCATIONAL REHABILITATION BENEFITS TO A BLIND COLLEGE STUDENT ELIGIBLE UNDER RELIGIOUSLY NEUTRAL CRITERIA WHERE THE STUDENT INTENDS TO USE THOSE BENEFITS TO PURSUE A CHURCH-ORIENTED CAREER

Respondent, the Washington State Department of Services for the Blind, with federal financial assistance, has embarked on a program of assisting blind persons "to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." Wash. Rev. Code Ann. § 74.16.181 (1982). Respondent provides, among other forms of assistance, tuition reimbursement for vocational education. The choice of vocation, and the choice of educational institution, is left to the individuals involved.

Petitioner Witters is blind, and it is undisputed that he is eligible for assistance under this program. He has chosen to study for a career as a pastor, missionary, or religious education director. It is not contended that such a career falls outside the purposes for which the Washington program is established; a career in the ministry would enable petitioner to overcome vocational handicaps and to support himself. Nonetheless, petitioner has been denied the benefits to which he is entitled under the program. The sole reason for the denial of these benefits, under the holding of the state Supreme Court, is that to grant them would violate the Establishment Clause of the First Amendment.

We believe that the court below has committed a basic analytical error in its application of the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971),

to the facts of this case. We will discuss that error in detail below. But first, we wish to stand back from the detailed doctrinal analysis of this case to pose the fundamental question: whether, "in reality," the provision of educational assistance to a blind college student choosing to pursue a church-oriented career, in common with other handicapped persons pursuing careers of their choice, "establishes a religion or religious faith, or tends to do so." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8-9.

A. The History Surrounding The Enactment And Early Interpretation Of The Establishment Clause Demonstrates That Neutral Assistance To Education Is Not Unconstitutional

James Madison, author of the draft of the Establishment Clause first introduced in Congress, explained on the floor of the House of Representatives that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 Annals of Cong. 731 (J. Gales ed. 1789).[4] Almost fifty years later,

[4] Madison's famous *Memorial and Remonstrance* (see *Everson* v. *Board of Education*, 330 U.S. 1, 12 (1947)) is not to the contrary. The subject of the *Memorial and Remonstrance* was a proposal before the state legislature to make "provision for Teachers of the *Christian* Religion" (*Memorial and Remonstrance*, reprinted in full at 330 U.S. at 63-72 (emphasis supplied)), which Madison understood as a preference for "Christianity, in exclusion of all other Religions" (*id.* at 65). Central to Madison's argument in the *Memorial and Remonstrance* was that the proposal "violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions" (*id.* at 66). The vice

Joseph Story, perhaps the leading commentator on the Constitution in the early days of the Republic, explained in a similar vein, "The real object of the [First] Amendment was * * * to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833), quoted in *Lynch* v. *Donnelly*, slip op. 9. Similar interpretations were offered during this period by a unanimous Supreme Court in *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 48-49 (1815) (concerning the Virginia disestablishment), and the Judiciary Committee of the Senate in S. Rep. 376, 32d Cong., 1st Sess. 1 (1853).

The Establishment Clause was not thought to prohibit neutral aid to education, religious as well as nonreligious. During the first half century under the Constitution, Congress frequently made land grants for the support of education, including schools op-

in the proposal, in other words, was that it preferred one religion over the others.

The weight of the historical evidence indicates that the *Memorial and Remonstrance* reflects a more strictly separationist view than that espoused by Madison in Congress in connection with the Establishment Clause (which he in fact deemed unnecessary (1 Annals of Cong., *supra*, at 758)), and that Madison's views, in turn, were more radical on this issue than Congress and the States were willing to accept (hence the compromise language of the First Amendment). See, *e.g.*, C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 126-142, 197-198 (1964); M. Malbin, *Religion and Politics* 16-17 (1978); see also R. Cord, *Separation of Church and State* 20-36 (1982). Nonetheless, nondiscriminatory aid of the sort at issue here is consistent even with the views expressed in the *Memorial and Remonstrance*.

erated by religious denominations.[5] See C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 163-164 (1964). Congress made grants of land in 1832 and 1833 to two denominational colleges in the District of Columbia—Columbia College and Georgetown College. Not until 1845 did Congress, for the first time, limit the use of land set aside for schools to "public schools." *Ibid.* States having disestablishment laws of their own similarly supported religious as well as nonreligious education. *Id.* at 165, 168. One historian has commented that "it was a very common thing indeed for the civil authorities in the states which pretended to give free education only to pauper children, to pay the tuition of such children in denominational schools." E. Reisner, *Nationalism and Education Since 1789*, at 364 (1922). The overriding principle was (in this Court's later words) that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982).

The fear of a "national ecclesiastical establishment" may be remote at this juncture in our history; however, it is as vital today as it was at the founding to ensure that the power, resources, and prestige of the government not be turned to the services of a religious sect or combination of sects. The point of the Establishment Clause is not to exclude religious institutions or individuals from the benefits our society provides, but to guarantee that the government does not confer the " 'imprimatur of State approval' " on any particular religion, or on religion generally.

[5] Indeed, one of the reasons stated for land grants for educational purposes was to provide support for "[r]eligion, morality, and knowledge." See Northwest Ordinance, ch. VIII, art. III, 1 Stat. 52.

Mueller v. *Allen*, 463 U.S. at 399; *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981); see *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) (O'Connor, J., concurring).[6] As the Court stated in *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), the "basic purpose" of the Religion Clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited."

To allow individuals to receive the benefit of facially neutral government programs, even where the individuals have a religious purpose or calling, does not signal government approval for their religion, but shows a wholesome "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669; see *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring). It no more "advances" the cause of a religion to assist petitioner Witters, like other handicapped citizens of the State of Washington, to obtain training for the career of his choice than it does to accord police and fire protection to

[6] Government nonetheless may accommodate or facilitate the practice of religion in ways not equally applied to nonreligious activities. So long as such accommodations are neutral among religions, neither induce nor coerce religious beliefs, and are administered in a way that does not interfere with the autonomy of religious institutions, they are constitutional. See, *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Gillette* v. *United States*, 401 U.S. 437 (1971); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Such accommodations do not establish a religion, but—in keeping with the special status of religion in the Constitution itself—accord special treatment to the liberty of religious exercise. See *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). This case involves only equal treatment—not preferential accommodation—of religion.

churches (in common with other buildings), to allow a Bible study group to meet in a public university (in common with other student groups),[7] or to allow parents to deduct specified expenses of educating their children in religious schools from their taxes (in common with other parents).[8]

On the contrary, to *single out* petitioner Witters' choice of vocation would be to discriminate against religion—to relegate religion to a disfavored position in the public arena. "[W]e must be careful, in protecting the citizens * * * against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); see *McDaniel* v. *Paty*, 435 U.S. at 638 (Brennan, J., concurring).

B. When, For Secular Purposes, The Government Provides Financial Aid To Individuals On a Facially Neutral Basis, The Individuals' Use Of That Aid For Religious Ends Or In Religious Contexts Does Not Constitute An Establishment

One of the most vexing questions in constitutional law has been when and under what terms religious *institutions* may participate in or benefit from public programs of general applicability. Although, as the Court stated in *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976), "religious institutions need not be quarantined from public benefits that are neutrally available to all," some of the Court's most

[7] *Widmar* v. *Vincent, supra*; see also *Bender* v. *Williamsport Area School District*, cert. granted, No. 84-773 (Feb. 19, 1985).

[8] *Mueller* v. *Allen, supra*.

difficult and controversial decisions have been concerned with how to ensure that government aid provided, for legitimate and secular purposes, to religious institutions is not used to foster their religion. See, *e.g.*, *Lemon* v. *Kurtzman, supra; Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980). The conflict over aid to parochial elementary and secondary schools has been especially sensitive, because of the particular danger in that context of government aid being understood as contributing to religious indoctrination.

In contrast, the Court has rarely—indeed, only once, and then in circumstances far different from these—found that the Constitution bars neutral financial aid to *individual recipients* merely because they choose to use the aid in religious contexts or for their own religious purposes. It is "noteworthy that all but one of [the Court's] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Mueller* v. *Allen*, 463 U.S. at 399. The one exception is *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools, rather than a general program for the benefit of all schoolchildren.[9]

[9] See also *Lemon* v. *Kurtzman*, 403 U.S. at 621, in which the Court distinguished *Everson* and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), on the ground that in those cases the "state aid was provided to the student and his parents—not to the church-related school"; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 781; *Walz* v. *Tax Commission*, 397 U.S. at 675.

The reasons for this distinction follow directly from the rationale for the Establishment Clause itself. When government provides assistance to individuals for secular reasons, it is evident that the government is not using its resources to prefer one religion over another, or even religion over nonreligion—even though some individuals may make use of the benefit in a religious manner. The ultimate use and allocation of the benefit will not be determined by the government, but "only as a result of numerous, private choices of individual" citizens. *Mueller* v. *Allen*, 463 U.S. at 399.

In this respect, the provision of aid here is similar to the tax deductibility of contributions to religious organizations. Although tax deductions for contributions undoubtedly confer a substantial benefit on churches and synagogues—along with countless other charitable, educational, scientific, cultural, and historical organizations—their constitutionality has never been questioned by this Court, precisely because the deductions operate to increase the "diversity and pluralism in all areas" of our society (see *Lynch* v. *Donnelly*, slip op. 8) and facilitate both the free exercise of religion by believers and similar voluntary associational activities by their adherents. See generally *Walz* v. *Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

The State could, if it chose, channel its vocational assistance for handicapped persons toward careers the State deems appropriate, or insist that rehabilitative programs be undertaken in educational institutions operated by the State. However, to leave these decisions to the individuals involved is an equally permissible approach—one which enhances individual choice, increases the diversity of skills

available to society, and widens the range of educational institutions in the community.

Moreover, when government aid is provided to individuals, as opposed to institutions, there is no danger of entangling administrative relationships between government and religious officials. Other than the relatively routine decision to accredit an educational institution on the basis of educational quality —an administrative relation long held to be constitutional (see *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925))—such an approach does not involve the government in the affairs of the institution. Cf. *Walz* v. *Tax Commission*, 397 U.S. at 675 ("Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."). Accordingly, as this Court has recently observed, "a program * * * that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. at 398-399.

Federal government programs are structured in accordance with this constitutional framework. Generally speaking, when benefits are provided to individuals, the government does not require that the individual use the aid for nonreligious purposes or in nonreligious settings. The very context in which this case arises—higher education assistance—is a prime example. Grants directly to students, such as Pell Grants or GI Bill benefits, may be used by those students, if they choose, for education in religious colleges or for training for church-oriented careers. See pages 2-4, *supra*. The federal govern-

ment does not consider it appropriate, on Establishment Clause grounds or any other, to limit the freedom of students assisted under these programs to choose religious alternatives. The test for providing such benefits should not be whether the student's chosen course of study is in a school sponsored by a religious group, has religious content, or leads to a religiously-oriented career, but whether it leads to a valid "educational, professional, or vocational objective." See 38 U.S.C. 1670.[10]

On the other hand, when aid is provided directly to institutional grantees, limitations are often placed on the aid to ensure that it is used for secular purposes and not diverted to religious ends. See, *e.g.*, 20 U.S.C. 122 (grants to Howard University may not be used for the support of the theological department); 20 U.S.C. 1021(c) (college or research library grants may not be used for written materials used in sectarian instruction or religious worship); 20 U.S.C. 1070e, 1070e-1 (cost of instruction grants to colleges may not be used for school of divinity, religious worship, or sectarian activity); 29 U.S.C. 1517,

[10] The only provision of which we know that might be considered an exception is 20 U.S.C. 1134e(g). The Secretary of Education is authorized to make grants to institutions of higher education so that those institutions may "mak[e] available the benefits of post-baccalaureate education to graduate and professional students who demonstrate financial need." 20 U.S.C. 1134d. Following provisions setting out priority categories for institutions and individual students (see 20 U.S.C. 1134e(d) and (e)), Section 1134e(g) provides that "[n]o fellowship shall be awarded under this part for study at a school or department of divinity."

1577(a) (Job Training Partnership Act funds may not be used for religious facilities).[11]

The decision of the court below conflicts with this longstanding federal practice. Under the Washington Supreme Court's decision, the government would have to engage in far more searching inquiry into students' career objectives and courses of study than is now required—or even permitted—under law. A narrow interpretation of the decision would suggest

[11] Restrictions applicable to Rehabilitation Act grants, which presumably are the source of federal funding for the program at issue here, are of this sort. In general, Department of Education regulations preclude grants to institutional entities when such entities would use them for religious purposes, but place no such restrictions on facially neutral grants to individuals. Certain multi-program regulations now applicable to the Rehabilitation Act program prohibit the use of funds for "[r]eligious worship, instruction, or proselytization" (34 C.F.R. 76.532(a)(1)) or for "[a]n activity of a school or department of divinity" (34 C.F.R. 76.532(a)(4)). These regulations are based on the Department's interpretation of constitutional requirements. The Department has informed us that it interprets these restrictions as applying to grants to institutional grantees and subgrantees, but not as precluding *individuals* who may be the ultimate beneficiaries of financial assistance under this program from using it for vocational training in a school of divinity. The funds could not, for example, be granted to a university to make its divinity school accessible to the handicapped, but a scholarship grant under the program could be used by a handicapped individual to defray the cost of education at a divinity school.

The multi-program regulations quoted above became applicable to the Rehabilitation Act program only in 1981 (after petitioner applied for and was denied benefits), after responsibility for administration of the program was transferred to the Department of Education. At the time of petitioner's application, grants under this program had no specific restrictions regarding religious uses.

that the State is forbidden to fund only the "religious education" of persons intending to become ministers (Pet. App. A10); although, since petitioner's entire grant was disallowed, this narrow interpretation may not be correct.[12] Under the full force of the Washington Supreme Court's logic, any funding of religious studies is presumably suspect. Accordingly, the Veterans' Administration might well be required to insist that its state approving agencies (see page 3, *supra*) examine various unit courses taught at sectarian schools (such as Notre Dame University or Georgetown University) to determine whether they are religious or sectarian in nature, and the Department of Education might well have to require students to certify, as a condition of receiving a student loan, that they do not intend to enter the ministry. We submit that it is neither administratively feasible nor constitutionally appropriate for the government to engage in this type of inquiry. A neutral program of educational grants such as that now in place is, we submit, fully consonant with the Religion Clauses of the First Amendment.

Indeed, this Court has repeatedly distinguished "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted"—specifically referring to the "G.I. Bill"—from impermissible forms of aid. *Nyquist*, 413 U.S. at 782-783 n.38; see also *Mueller* v. *Allen*, 463 U.S. at 398-399; *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Wolman* v. *Essex*, 342 F. Supp. 399, 412 n.17 (S.D. Ohio), aff'd, 409 U.S. 808 (1972). And in *Americans United for the Separation of Church & State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977), the Court summarily affirmed a lower court decision upholding a state statute providing aid to all needy college students, including but not limited to those in religious colleges.[13] The judgment of the Washington Supreme Court is inconsistent with these decisions.

[12] Some of petitioner's course work—*e.g.*, speech instruction (see page 6, *supra*)—is apparently secular in nature.

C. The Court Below Erred In Its "Primary Effects" Analysis By Focusing On The Religious Use In Isolation Rather Than On The Full Context Of The Program

The Washington Supreme Court employed the three-part Establishment Clause analysis of *Lemon* v. *Kurtzman*, 403 U.S. at 612-613. See Pet. App. A5-A6. The court had no difficulty in concluding that the State's program of vocational assistance to the blind has a legitimate secular purpose (*id.* at A6-A7). Cf. *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985),

[13] In *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975), the court held that while the receipt by students of GI Bill benefits constituted federal financial assistance to the church-affiliated university involved in that case for purposes of the civil rights laws, it did not constitute unconstitutional state aid for purposes of the Establishment Clause. Cf. *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), slip op. 8, 10 n.15, citing *Bob Jones University* v. *Johnson*, *supra*. The reasons advanced by the government and adopted by the Court in *Grove City College* for treating student grants as aid to the institutions for purposes of Title IX of the Education Amendments of 1972 derive from the statutory objectives and unambiguous legislative history. See slip op. 7-13. The constitutional standard for judging whether the "primary effect" of a program is to "advance religion," which serves far different purposes, is not the same as that adopted by Congress under Title IX for determining when an institution must comply with laws against discrimination.

slip op. 17. Moreover, commenting that the " 'entanglement' inquiry is ill-suited to this case," the court stated that "the administrative and trial court records do not provide an adequate factual basis to make the type of [entanglement] inquiry contemplated by the Supreme Court" (~~*id.* at~~ A12). The decision below thus rested entirely on a finding that "the principal or primary effect of the aid sought by [petitioner] would be to advance religion" (*id.* at A10).[14]

In analyzing the "primary effect" of the program, the court stated (Pet. App. A8):

> Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the [petitioner].

The court accordingly found (*id.* at A9-A10) that "[t]he provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion. * * * It is not the role of the state to pay for the religious education of future ministers."

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[14] If this Court reverses on the "primary effect" finding, and respondent chooses to litigate the issue of " 'entanglement' " on remand, it should be free to do so. As the court below recognized (Pet. App. A12), the factual record is insufficient to support a finding of unconstitutionality on this ground, and further fact-finding might be in order. On the merits we submit, however, that the program at issue plainly does not entail an excessive entanglement between church and state. The only direct relationship involving the government is that with petitioner Witters; the government is not involved in overseeing or regulating the religious institutions at which petitioner has studied.

This analytical approach is, we submit, fundamentally in error. If a court focuses solely on the challenged element in an overall program—*i.e.*, solely on the religious element—it will always find that the "primary effect" is to advance (or inhibit) religion. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, slip op. 10. The "crucial question is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary* effect advances religion." *Tilton* v. *Richardson*, 403 U.S. at 679 (emphasis supplied). To determine whether the religious effect is "primary," one must necessarily examine that effect in the context of the program as a whole.[15]

Here, for example, there can be no claim that the state vocational rehabilitation program, taken as a whole, runs afoul of the "effects" test, properly conceived. It is probable that only a tiny fraction of the beneficiaries use their vocational rehabilitation grants to prepare for a religious vocation.[16] Even the court below acknowledged (Pet. App. A8) that the program is "neutral in that benefits are provided to the stu-

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[15] The approach of the court below would be sound only if the Establishment Clause were held to prohibit *any* government action, the ultimate effect of which is to benefit religion —a view that has been consistently rejected by this Court. *McDaniel* v. *Paty*, 435 U.S. at 638 (Brennan, J., concurring); *Hunt* v. *McNair*, 413 U.S. 734, 742-743 (1973); *Everson* v. *Board of Education*, 330 U.S. at 16.

[16] In this respect, the instant case is less troublesome than *Mueller*. In *Mueller*, the evidence suggested that the "bulk" of the benefits involved would flow to religious uses, partly because 96% of the children in private schools attended religiously-affiliated institutions. 463 U.S. at 401.

dent irrespective of the type of school attended or the degree sought." The effect of the rehabilitation program is precisely the same as its purpose: it provides vocational training to handicapped persons to improve their job skills and self-reliance. There is no reason to assume that the benefit to religion from providing aid to otherwise eligible students for the ministry, to the extent there is any benefit, is other than minor and incidental.

This Court has never used the analytical approach employed below to strike down the neutral provision of benefits to a wide spectrum of beneficiaries. Rather, the Court has used the opposite approach—to examine the challenged "effects" in the context of the wider program.[17] See, *e.g.*, *Mueller* v. *Allen*, 463 U.S. at 397-399 (tax deduction statute available to all parents of schoolchildren, including those with children attending sectarian private schools); *Widmar* v. *Vincent*, *supra* (access to university facilities by all student groups, including religious groups); *Tilton* v. *Richardson*, 403 U.S. at 687 (construction grants for higher education facilities generally); *Walz* v. *Tax Commission*, *supra* (tax exemptions for all educational and charitable non-profit institutions); *Board of Education* v. *Allen*, 392 U.S. at 242 (textbook loans to all schoolchildren); *Everson* v. *Board of Education*, 330 U.S. at 16 (bus fare extended to all schoolchildren). In any of these instances, the Washington Supreme Court's analysis would have led to invalidation of the program.

[17] The court below relied for its approach on a statement in *Hunt* v. *McNair*, 413 U.S. at 742, that under the "effects" inquiry a court must "narrow [its] focus from the statute as a whole to the only transaction presently before us." See Pet. App. A8. However, in *Hunt*, the Court upheld the program even on that narrow basis, making it unnecessary to consider alternative bases for a finding of constitutionality. The decision there provides no warrant for invalidating a program where, under the full context of the program, the "primary effect" is not to advance or inhibit religion.

The State's vocational rehabilitation program involved in this case has all the traditional indicia of a secular government assistance program with a secular primary effect. The program is neutrally designed to provide aid to *all* persons who fall within the class of beneficiaries—the visually handicapped. Contrary to the Washington Supreme Court's view, a program that assists a broad class of beneficiaries without regard to religion does not violate the Establishment Clause merely because one, some, or even many of the beneficiaries happen to be religious. "The historic purposes of the [Establishment Clause] simply do not encompass th[is] sort of attenuated financial benefit [to religion], ultimately controlled by the private choices of individual" beneficiaries. *Mueller* v. *Allen*, 463 U.S. at 400.

D. This Court Need Not, And Should Not, Consider The Remaining Issues In The Case

The sole basis for the decision below was the Establishment Clause of the First Amendment. This rationale had not been advanced by respondent before the Washington Supreme Court or at any other stage in the litigation. The theory most vigorously pressed by respondent was that the provision of aid to petitioner for his education for the ministry would violate the State's equivalents to the Establishment Clause, Wash. Rev. Code Ann. art. 1, § 11; art. 9, § 4 (1966). The court below found it "unnecessary to address the constitutionality of the aid under our state constitution" (Pet. App. A2). The court did,

however, strongly hint that it would find the aid unconstitutional under the state constitution, commenting that "our state constitution requires a far stricter separation of church and state tha[n] the federal constitution" (*ibid.*).

If the state constitution is held to prohibit aid to petitioner's education, that holding will raise serious and difficult questions of federal statutory and constitutional law, which have not been addressed by the lower courts. Specifically, it will raise the question whether petitioner is entitled to participate in the program under the terms of the federal grant to the State, and, if so, whether the State is permitted under the program to attach more stringent (and arguably discriminatory) eligibility criteria than those adopted by Congress and the Secretary of Education. See 29 U.S.C. 721(a)(5)(A). Moreover, assuming that there is no federal statutory bar to excluding petitioner from the program, such an interpretation of the state constitution would raise the question whether petitioner's rights under the Equal Protection Clause or the Free Exercise Clause would be infringed by a ruling that church-oriented careers alone are excluded from the benefits of the program. That question, not dissimilar to the issues raised in *Board of Trustees* v. *McCreary*, No. 84-277 (Mar. 27, 1985) (equally divided Court); *Widmar* v. *Vincent*, *supra*; *McDaniel* v. *Paty*, *supra*; and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), is substantial, and the Supreme Court of the State of Washington should have an opportunity to consider the question in the first instance. Although that court has considered, and rejected, petitioner's free exercise argument (Pet. App. A14-A17), it did so on the assumption that the Establishment Clause would be violated by a grant of the vocational rehabilitation benefits. If there are no

countervailing federal constitutional considerations, the argument may appear in a different light. Moreover, the court expressly declined to address petitioner's "novel" equal protection claim because the Establishment Clause holding made resolution of that claim unnecessary (*id.* at A16-A17).

There is no need for this Court to grapple with these issues in the current posture of the case, unassisted by the views of the courts below. Although the Washington Supreme Court has adumbrated its likely answer to the question whether the state constitution would be violated by a grant for the support of petitioner's vocational education, the court expressly declined to decide the issue in a formal sense. This Court should not address the sensitive question of the compatibility of a state's constitution with the federal constitution in the absence of a definitive interpretation of the state constitution. Moreover, the state courts have not explained the basis and rationale for the state constitutional provision. It would therefore be difficult to evaluate whether the distinctions drawn by the State would pass muster under the Equal Protection Clause or be sufficiently compelling to outweigh petitioner's free exercise rights.

Accordingly, we urge the Court to confine its consideration to the Establishment Clause holding of the court below, and allow the parties to raise any other issues on remand, if the judgment is reversed.

CONCLUSION

The judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
MICHAEL JAY SINGER
Attorneys

JUNE 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10237